

THE HONORABLE JAMAL N. WHITEHEAD

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

IN RE VALVE ANTITRUST LITIGATION

Case No. 2:21-cv-00563-JNW

**PLAINTIFFS' SUPPLEMENTAL BRIEF
IN RESPONSE TO DEFENDANT'S
MOTION TO EXCLUDE TESTIMONY
OF STEVEN SCHWARTZ, PH.D.,
AUTHORIZED BY DKT. NO. 351**

ORAL ARGUMENT REQUESTED

**NOTE ON MOTION CALENDAR:
SEPTEMBER 9, 2024**

I. BACKGROUND

Plaintiffs contend that Valve has maintained its dominance in the PC game distribution market through its Platform Most Favored Nations (“PMFN”) Policy. The PMFN prevents PC game publishers from offering to sell their games for lower prices or with superior content on rival game distribution platforms than they offer on Steam. The PMFN thereby blocks other game platforms from employing what would otherwise be their most potent competitive weapons to gain and hold market share from Steam: lower prices for and enhanced versions of games. By ensuring publishers cannot differentiate their games with better prices or content on PC game distribution platforms, Valve’s PFMN allows Valve to charge supracompetitive commissions to publishers, which harms all publishers every time they pay the inflated commissions to Valve. Consumers are also harmed, as publishers partially pass-on those inflated commissions to consumers in the form of higher game prices, and are prevented from providing differentiated content to consumers on other platforms. In a competitive PC game distribution market, Valve would be forced to compete by lowering its supracompetitive commissions.

To demonstrate these economics to the jury and to prove class-wide impact and damages, Plaintiffs will offer, among other evidence, the testimony of Dr. Steven Schwartz. Valve seeks to exclude Schwartz’s analysis and, as part of those efforts, filed a Reply In Support of Its Motion to Exclude (hereinafter the “Reply”) (Dkt. 337), along with an accompanying “reply” expert report (Dkt. 338-1). On August 30, 2024, the Court permitted Plaintiffs to file a supplemental brief to respond to two of Valve’s arguments offered on reply: (1) that Schwartz’s opinion is purportedly flawed because he “pretends Steam Key sales have no impact at all,” and fails to consider Wolfire’s large number of Steam Key transactions relative to the number of its Steam Store transactions; and (2) that Schwartz’s opinion is purportedly flawed because he “improperly treats Steam as [a] one-sided [platform]” by not “consider[ing] charges and benefits on both sides of the platform,” and specifically by supposedly not accounting for fees consumers pay for “Community Market” transactions. (See Dkt. 351 at 2 & n.1; Dkt. 341 at 2). The Court’s Order also permitted Plaintiffs

1 to submit a surreply expert report. (Dkt. 351 at 2).

2 Valve is wrong on both counts. The Court should deny Valve's motion.

3 **II. ARGUMENT**

4 **A. Schwartz's Opinion Properly Considers the Likely Role of Steam Keys in the But- 5 For World (Valve's Reply 3:1-4:2)**

6 Valve argued in its opening *Daubert* brief that it is necessary to compute an "effective
7 revenue share" that accounts for a class member's "Steam Key" transactions. *See* Dkt. 232, Mot.
8 12-13. In opposition, Plaintiffs explained that Valve's "effective revenue share" involves legally
9 infirm netting and generates nonsensical results, such as a class member being worse off in a world
10 where the prices come down on *all* platforms across the market. Dkt. 317, ("Opp."), 11-12.

11 On reply, Valve argues that Schwartz's opinion is flawed because (1) he "pretends Steam
12 Key sales have no impact at all," and (2) "what – if anything – publishers paid *to other platforms*
13 cannot be established without individual inquiry." Reply 3 (emphasis added). Specifically, Valve
14 points out that Wolfire used "over 3,000,000" Steam Keys while Wolfire "sold 174,963 units on
15 Steam." *Id.* Valve's unstated but nonsensical implication is that heavy users of Steam Keys, such
16 as Wolfire, would somehow be worse off in a world without the PMFN, and with additional
17 platform competition. Not so. Valve's argument implicitly assumes that Steam Keys may vanish
18 in the but-for world (as that is the only way a Steam Key user like Wolfire might somehow be
19 worse off). But there is no basis in the record for that assumption. *See* Sur-Reply Report of Steven
20 Schwartz, Ph.D., September 9, 2024 ("Schwartz Sur-Reply Rpt."), ¶ 17, fn. 20. To the contrary, if
21 Valve faced genuine competition for the first time, Valve would need to **add**, rather than **remove**,
22 features from its platform. *Id.* ¶¶ 16-17. Therefore, not only would Wolfire still be able to utilize
23 Steam Keys in the but-for world for off-Steam transactions, but also Wolfire's Steam Store
24 transactions would occur at lower prices relative to the real world. *Id.* ¶ 17. Wolfire would be better

off in a world with additional platform competition. In the absence of that competition, therefore, Wolfire was harmed by Valve’s illegal conduct. *Id.*

Valve again misses the mark when it asserts, based on its analysis of Wolfire’s use of Steam Keys, that “what—if anything—publishers *paid to other platforms* cannot be established without individual inquiry.” Reply 3 (emphasis added). What Wolfire paid *to other platforms* for those transactions accomplished with Steam Keys is not relevant to the class certification inquiry, and certainly provides no basis for a *Daubert* motion here. Instead, the relevant question is whether Plaintiffs can use common evidence to show that Wolfire and other class members paid supracompetitive commissions *to Valve on Steam transactions*. What Wolfire (or other class members) paid *to other platforms for sales that occurred on other platforms* would be relevant only if it were appropriate to use Wolfire’s supposed benefits from those off-Steam transactions to off-set or net against the *harm* that Valve causes on Steam transactions where publishers pay commissions to Valve. But such netting is not factually supportable, would be legally infirm, provides no basis to deny class certification, Class Cert. Reply, Dkt. 315 at 8-11, and is no basis to exclude expert testimony.

B. Schwartz Did Not Treat Steam as One-Sided (Valve Reply 5:13-6:3)

Valve argued in its opening brief that Schwartz “impermissibly analyzes Steam as a One-Sided Platform.” Mot. 3-6. In opposition, Plaintiffs explained that Schwartz expressly opines that “Steam is a two-sided platform,” Dkt. 182-1, Schwartz Rpt. ¶ 57, Dkt. 316-1, (“Schwartz Reply Rpt.”), ¶ 56, and that each of Schwartz’s class-wide impact and damages opinions treats Steam as such. Opp. 3-4. As Plaintiffs further explained, Valve’s arguments “focuse[d] on a single aspect of Schwartz’s damages approach: his opinion that Valve would continue to use an agency pricing model in the but-for world, as it does in the real world.” *Id.* at 3.

In Reply, Valve again attacks Schwartz’s use of an agency pricing model. Specifically, one of the reasons agency pricing is appropriate here, despite the two-sided nature of Steam, is because Valve has a “lack of transaction costs,” which are defined as a “broad range of frictions that make it costly for one side of the market to pass through a redistribution of charges to the other side.”

1 Schwartz Reply Rpt. ¶ 203. On Reply, Valve now argues that this condition is violated because
 2 Steam “imposes charges on both sides of the platform” because customers must pay fees on “Steam
 3 Community Market” transactions. Reply 5. But the fees charged on Steam Community Market
 4 transactions are not plausibly “transaction costs” in the sense that would be relevant here.

5 Steam Community Market transactions *are not* Steam Store transactions, and do not
 6 involve publishers paying a commission to Valve. Schwartz Sur-Reply Rpt. ¶ 28. Moreover, there
 7 is no evidence that Community Market transactions affect the economics of Steam Store
 8 transactions or Valve’s commissions charged to publishers in any way. *Id.* ¶ 29. Rather, Steam
 9 Community Market transactions *occur between two consumers*, and involve the sale of in-game
 10 merchandise (for example, a certain sword) or other similar ancillary transactions. These are not
 11 transactions between publishers and consumers, nor are they transactions on which publishers pay
 12 a commission to Valve. Nor has there been any suggestions that, in a but-for world without the
 13 PMFN, Community Market transactions would be eliminated, or that the fee structure for
 14 Community Market transactions would change in any way. *Id.* ¶ 29, fn. 50. The Steam Community
 15 Market and Valve’s fees on consumer-to-consumer transactions, therefore, do not undermine or
 16 alter Schwartz’s opinion that an agency-pricing model is appropriate here, nor do they undermine
 17 or alter the remainder of Schwartz’s two-sided analysis. *Id.*

18 In any event, this disagreement is fundamentally one regarding the economic principles
 19 underpinning Schwartz’s opinion. That is a classic “battle of the experts” that should be decided
 20 by a fact-finder and not as part of a *Daubert* motion. *See In re NCAA I-A Walk-On Football*
 21 *Players Litig.*, 2006 WL 1207915, at *11 (W.D. Wash. May 3, 2006) (“[T]his Court will not
 22 engage in a battle of the experts”). This Court should, therefore, reject Valve’s *Daubert* motion.

23 **III. CONCLUSION**

24 For these reasons, Plaintiffs respectfully request that the Court deny Valve’s Motion to
 25 Exclude Testimony of Steven Schwartz, Ph.D.

DATED: September 9, 2024

Respectfully submitted,

/s/ Alicia Cobb

/s/ Stephanie L. Jensen

Alicia Cobb, WSBA #48685
QUINN EMANUEL URQUHART &
SULLIVAN, LLP
1109 First Avenue, Suite 210
Seattle, Washington 98101
Phone (206) 905-7000
Fax (206) 905-7100
aliciacobb@quinnemanuel.com

Stephanie L. Jensen, WSBA #42042
Tyre L. Tindall, WSBA #56357
WILSON SONSINI GOODRICH &
ROSATI P.C.
701 Fifth Avenue, Suite 5100
Seattle, WA 98104-7036
Phone (206) 883-2500
Fax (866) 974-7329
sjensen@wsgr.com
ttindall@wsgr.com

Steig D. Olson (*pro hac vice*)
David LeRay (*pro hac vice*)
Nic V. Siebert (*pro hac vice*)
Andrew Faisman (*pro hac vice*)
QUINN EMANUEL URQUHART &
SULLIVAN, LLP
51 Madison Avenue
New York, New York 10010
Phone (212) 849-7231
Fax (212) 849-7100
steigolson@quinnemanuel.com
davidleray@quinnemanuel.com
nicolassiebert@quinnemanuel.com
andrewfaisman@quinnemanuel.com

Kenneth R. O'Rourke (*pro hac vice*)
Jordanne M. Steiner (*pro hac vice*)
WILSON SONSINI GOODRICH &
ROSATI, P.C.
1700 K Street, NW, Suite 500
Washington, DC 20006
Phone (202) 973-8800
Fax (866) 974-7329
korourke@wsgr.com
jordanne.miller@wsgr.com

Adam Wolfson (*pro hac vice*)
QUINN EMANUEL URQUHART &
SULLIVAN, LLP
865 S. Figueroa St., 10th Floor
Los Angeles, California 90017
Phone (213) 443-3285 | Fax (213) 443-3100
adamwolfson@quinnemanuel.com

W. Joseph Bruckner (*pro hac vice*)
Joseph C. Bourne (*pro hac vice*)
Laura M. Matson (*pro hac vice*)
LOCKRIDGE GRINDAL NAUEN P.L.L.P.
100 Washington Avenue S, Suite 2200
Minneapolis, MN 55401
Phone (612) 339-6900
Fax (612) 339-0981
wjbruckner@locklaw.com
jcbourne@locklaw.com
lmmatson@locklaw.com

Ankur Kapoor (*pro hac vice*)
Noah Brecker-Redd (*pro hac vice*)
CONSTANTINE CANNON LLP
6 East 43rd St., 26th Floor
New York, NY 10017
Phone (212) 350-2700
Fax (212) 350-2701
akapoor@constantinecannon.com
nbrecker-redd@constantinecannon.com

Kyle Pozan (*pro hac vice*)
LOCKRIDGE GRINDAL NAUEN P.L.L.P.
1165 N. Clark Street, Suite 700
Chicago, IL 60610
Phone (612) 339-6900
Fax (612) 339-0981
kjpozan@locklaw.com

J. Wyatt Fore (*pro hac vice*)
CONSTANTINE CANNON LLP
1001 Pennsylvania Ave., NW, Suite 1300N
Washington, D.C. 20004
Phone (202) 204-4527
Fax (202) 204-3501
wfore@constantinecannon.com

Interim Co-Lead Counsel

Interim Co-Lead Counsel

Kenneth J. Rubin (*pro hac vice*)
Timothy B. McGranor (*pro hac vice*)
Kara M. Mundy (*pro hac vice*)
Douglas R. Matthews (*pro hac vice*)
VORYS, SATER, SEYMOUR AND PEASE LLP
52 East Gay Street
Columbus, Ohio 43215
Phone (614) 464-6400
Fax (614) 719-4796
kjrubin@vorys.com
tbmcgranor@vorys.com
kmmundy@vorys.com
drmatthews@vorys.com

Thomas N. McCormick (*pro hac vice*)
VORYS, SATER, SEYMOUR AND PEASE LLP
4675 MacArthur Court, Suite 700
Newport Beach, California 92660
Phone (949) 526-7903 | Fax (949) 383-2384
tnmccormick@vorys.com

Executive Committee Member

LCR 7 CERTIFICATION

I certify that this memorandum contains no more than four pages of argument, in compliance with the page-count limit set forth in the Court's Order dated August 30, 2024 (Dkt. No. 351).

DATED: September 9, 2024

/s/ Alicia Cobb

Alicia Cobb, WSBA #48685

CERTIFICATE OF SERVICE

I hereby certify that on September 9, 2024, I caused a true and correct copy of the foregoing to be served on counsel for Valve via email and preliminarily filed under seal in this Court's CM/ECF system.

DATED: September 9, 2024

/s/ Alicia Cobb

Alicia Cobb, WSBA #48685